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IN THE

Supreme Court of the United States

October Term, 1956.

No. 101 MISC.

FRANCIS J. CURRAN, FRANCIS J. MAGUIRE and IRA F. JONES, JR.,
Petitioners,

v.

STATE OF DELAWARE,
Respondent.

BRIEF FOR THE STATE OF DELAWARE IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

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OPINION BELOW.

The opinion of the Superior Court of the State of Delaware in and for New Castle County is reported in 116 A. 2d 782 and is set forth in the Appendix to the Petition filed in this matter at pages A4-15. The opinion of the Supreme Court of the State of Delaware is reported in 122 A. 2d 126 and is set forth in Appendix to the Petition at pages A16-27.

JURISDICTION.

The judgment of the Supreme Court of the State of Delaware was entered on May 1, 1956. The jurisdiction of this Court was invoked under 28 U. S. C. Section 1257(3).

QUESTION PRESENTED.

Will the Court grant Certiorari where the only error alleged is that a Police Officer inadvertently testified inaccurately on a collateral or incidental point, namely, the hour that exculpatory statements were signed and how many copies were signed by the Defendants.

CONSTITUTIONAL PROVISION AND RULES OF COURT INVOLVED.

Fourteenth Amendment to the Constitution of the United States, Section 1, provides:

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Rule 35. Correction or Reduction of Sentence.

(a) *Correction of Illegal Sentence.* The court may correct an illegal sentence at any time. A prisoner in custody under sentence and claiming a right to be released on the ground that such sentence was imposed in violation of the Constitution and laws of this State or the United States, or that the court imposing such sentence was without jurisdiction to do so, or that such sentence was in excess of the maximum sentence authorized by law or is otherwise subject to collateral attack, may file a motion at any time in the court which imposed such sentence to vacate, set aside, or correct the same. Unless the motion and the files and records of the case show to the satisfaction of the court

that the prisoner is not entitled to relief, the court shall cause notice thereof to be served on the Attorney General, grant a prompt hearing thereon, determine the issues and make findings of fact and conclusions of law with respect thereto. If the court finds that the judgment was rendered without jurisdiction or that the sentence imposed was illegal or otherwise subject to collateral attack, or that there was such a denial or infringement of the constitutional rights of the prisoner as to render the judgment subject to collateral attack, the court shall vacate and set aside the judgment and shall discharge the prisoner or re-sentence him or grant a new trial or correct the sentence as may appear appropriate. The court need not entertain a second motion or successive motions for similar relief on behalf of the same prisoner.

(b) *Reduction of Sentence.* The court may reduce a sentence within 60 days after the sentence is imposed, or within 60 days after receipt by the court of a mandate issued upon affirmance of the judgment or dismissal of an appeal, writ of error or writ of certiorari.

STATEMENT OF THE CASE.

Petitioners were indicted by the Grand Jury in and for New Castle County, State of Delaware.

They were tried and the jury found all the defendants guilty and recommended them to mercy. They were sentenced to life imprisonment, the minimum term permitted by the statute. Each defendant was represented by experienced counsel. No appeal was taken.

Chief Justice Southerland of the Supreme Court of the State of Delaware in his opinion, 122 A. 2d 126, in this case stated the facts to be, in part, as follows:

"At some time after midnight on October 30, 1947 Jean Igle, 23 years old, unmarried, was waiting for a bus

near the corner of Fourth and Union Streets in the City of Wilmington (T-10). An automobile passed and stopped (T-14). The three men were in it. Curran got out, approached the girl, and asked her for a match. She had none, and he offered to escort her home (T-16). She went with him. They walked west on Fourth Street, turned north (away from the direction in which lay her home), and went to a public park which extends for two blocks, from Fourth to Sixth Streets, along a railroad right of way (T-19, 20). They entered the park. While there Curran attacked her (T-20, 22). Maguire and Jones had followed them. All of them, she testified, ravished her (T-26, 27). Two witnesses living in nearby houses heard screams (T-174, 214-219). A woman in another nearby house called out to them: 'You had better leave that girl alone or I will call the cops.' At about a quarter of two a telephone call from an unknown woman was received at police headquarters. She said 'Please send the police quick, there is a girl screaming down in the Park on Ferris Street, and I think she is being raped' (T-27).

"After the woman had called out and threatened to call the police, Maguire and Curran left (T-27). Jones walked with the girl to Fourth Street, where police officers, in two police cars, found them (T-28). The girl, as soon as she was out of Jones' presence, made a complaint of rape (T-28).

"Jones was taken to the police station and the girl was sent to a hospital and examined (T-181). The medical and other testimony relating to her condition left no doubt that she had been subjected to brutal violence, and that sexual intercourse had taken place (T-204-213, 407-439).

"Maguire and Curran were arrested shortly thereafter.

"At the police station all three men were questioned by police officers and eventually signed statements. None of these statements admitted any violence. All

three statements asserted, or tended to show, that the girl had consented to intercourse."

• • •

"1. This statement was not before the jury; but it appears to us to be admissible as a part of a spontaneous exclamation. VI Wigmore, *Evidence*, Sec. 1750."

(By the Delaware Supreme Court)

• • •

Curran's and Maguire's statements were admitted after their individual counsel had both specifically stated that they had no objection to the admission of the statement. (Added by the writers of this brief.)

"As to Jones, the statement taken by the officers did not include an incriminating admission made when he was found with the girl by the police. He told Officer McDermott that she screamed so loud that a neighbor raised the window and threatened to call the police. In the statement taken by Rodenhiser, this admission is not found—certainly an indication that the examining officers were not attempting to extort a confession or to distort Jones' language." (T-165, 166) (Transcript references added by writers of this brief.)

The following recital of the facts is not from the Court's opinion:

The statement of Curran which was introduced in evidence at the trial contained the word "moaning" (T 251; PX 4). Officer Nagle testified that he recorded the statement and that he read the statement to Curran (T 147). Nagle also testified that Curran read the statement before he signed it and that he signed it in the presence of Delloso, Emering and Nagle (T 147-148). Nagle was talking about the statement that was admitted in evidence. That was the statement shown to him. That statement was admitted in evidence *without objection* (T 249). After it was read to the jury, Curran's attorney did not cross-examine Nagle (T 252).

Curran testified that he signed two statements, one in the afternoon (T 811-813). He said he did not use the word "moaning." But he admitted—and this is most significant—that he signed the statement that was in evidence and which contained the word "moaning" (T 813). He said he did not read it (T 818). This testimony is, however, contradicted by Nagle who testified not only that Curran read it, but that it was also read to Curran by him, even before it was taken out of the typewriter (T 247).

Curran admitted the statement introduced in evidence was read to him. However, he testified that it was not read to him until a half hour after it was typewritten (T 819). Although Nagle testified that he read the statement to Curran before the paper was removed from the typewriter, concededly it was also read to Curran some time later at the police line up. To this extent, Curran's testimony was correct. Curran was testifying about the very piece of paper and statement in evidence because the contents of the Exhibit were being read to him.

Curran did not deny that "moaning" was in the statement read to him (T 819). On the contrary, it is implicit in his answers that "moaning" was in the statement. He testified that he did not take exception to the statement, even though it was untrue. Now, since the only serious exception which he took at the trial to the statement introduced was the inclusion of "moaning", it necessarily follows that that word was in the statement read to him since he said the statement read to him was untrue. Equally important, he did not deny at the hearing that "moaning" was in the statement read to him. Curran's failure to take exception to the statement constituted an admission of its truth. It is unnecessary to argue out so plain a point.

So: there is testimony showing "moaning" (1) was in the statement read to and read by Curran at the time it was taken and (2) was in the statement read to him at the police line-up. His ambiguous denials at the trial (cf. T 778, 783-784 with 813-814) are irrelevant in the face of such testimony.

The statement of Maguire which was introduced in evidence at the trial contained the word "moaning" (T 357). After the statement had been carefully considered by Maguire's attorney (and presumably Maguire), it was admitted *without objection* (T 355-356).

Rodenhiser testified that the very statement introduced in evidence—including "moaning"—was the statement given by Maguire (T 358). When the State attempted to show the circumstances of the execution of the statement, Maguire's attorney objected on the ground that the statement was in evidence. (T 358-359). This objection was sustained (T 359).

Maguire testified that he signed two statements, one in the afternoon (T 895). He was questioned about the contents of the Exhibit. Although he testified he did not "recall" use of "moaning" (T 898), he admitted he signed the statement in evidence, which contained "moaning" (T 853). He does not deny that he read it. On the contrary, he admitted he scanned over the statement (T 890-891). More important, he did not deny that "moaning" was in that statement. Nor did he make such denial at the hearing. The failure to make such denial is significant when it is juxtaposed with Rodenhiser's trial and hearing testimony that the statement given by Maguire and introduced in evidence contained "moaning."

Rodenhiser testified that the statements were read to the defendants and that they did not make objection or take exception to them (T 367-368). Plainly, Rodenhiser was testifying about the Maguire statement introduced in evidence. It had just been read to the jury and he had just been questioned about it (T 358).

True, Maguire testified at trial that the statement in evidence, signed by him, was not the truth (T 853-854). But he does not charge the police with any duplicity in this respect. Rather, he testified that *he* lied in his statement because he did not want his wife to know that he had been in the park (T 853-854). Since Maguire admitted that he

intentionally gave a false statement, no credit can be given to his equivocal trial testimony that he did not "recall" the use of "moaning" (T 898), especially when it is remembered that he did not testify at the hearing. Moreover, he testified that he did not read the second group of papers presented to him and signed by him—most extraordinary testimony since he was then charged with rape and since he possessed, so he said, certain police powers and knowledge.

So: there was testimony showing "moaning" (1) was in the statement signed and scanned by Maguire and introduced in evidence (T 853-890-891) and (2) was in the statement read to hi[illegible] at the police line-up. His equivocal denial at the trial is irrelevant in the face of such testimony.

The circumstances surrounding the Jones' statement are similar to Maguire's, but are more complex.

The statement of Jones which was introduced in evidence at the trial contained "moaning" (T 351). Rodenhiser testified that Jones made several statements which he later admitted were not the truth (T 297), but that the statement which was reduced to writing was the truth (T 299). Rodenhiser also testified that he did not suggest "moaning" (T 314), and that the statement offered in evidence (and later admitted) was the last statement secured from Jones and signed by him (T 315). The importance of this testimony cannot be overemphasized. It constitutes testimony by Rodenhiser that the paper introduced contained the same words as the earlier paper, including "moaning". Rodenhiser could not have been confused in his testimony because he was questioned specifically about "moaning" just a few questions before (T 314).

Furthermore, Jones' attorney did not question that Jones had knowingly signed the statement offered. Rather, his contention was that Jones signed a *later* statement, which he thought the State should produce (T 315-316; 348-349).

True, Jones' attorney also said Jones was going to testify that the statement introduced was not the statement signed by Jones at the time (T 901). But Jones did not so testify. Finally, Jones' attorney says this line of questioning is not "of too great significance" (T 904) anyway, as is undoubtedly the case.

Moreover—and most important—*Jones* admitted that the statement in evidence was seen and signed by him (T 969).

Consequently, Jones' complaint is not that he did not knowingly sign the Exhibit, but rather that there was another statement which also should be introduced. But his testimony in this respect was contradicted by Rodenhiser who testified that the Exhibit was the last statement signed.

Rodenhiser testified that the statements were read to the petitioners and that they did not make objection or take exception to them (T 367-368). The context shows that Rodenhiser was testifying about the statements introduced in evidence.

So: there was testimony showing "moaning" (1) was in the statement knowingly signed by Jones (T 902, 969) and (2) was in the statement read to him at the police lineup. In fact, Jones did not deny, either at the trial or hearing, that he knowingly signed the statement introduced.

Rodenhiser admitted that Jones and Maguire signed two different sets of papers and that he destroyed the first set. He also admitted that his destruction was imprudent. He explained the stimulus for the second set of papers (H 83-84). He was a poor typist and the papers were not neat. Moreover, he had misspelled Curran's name. So he had the papers re-typed by an expert typist. This explanation is reasonable, especially when it is remembered that this was an important case. Rodenhiser was positive that he compared the text of the two sets of papers and they were the same (H 85, 91, 92, 93, 101, 105, 106, 108, 112, 116, 117, 120, 121, 122, 123). This accords with his trial testimony.

ARGUMENT.

Petitioners Have Not Attempted to Carry Burden of Showing Essential Unfairness.

> "If the result of the adjudicatory process is not to be set at naught, it is not asking too much that the burden of showing essential unfairness be sustained by him who claims such injustice and seeks to have the result set aside, and that it be sustained not as a matter of speculation but as a demonstrable reality." *Adams v. United States ex rel. McCann*, 317 U. S. 269, 281 (1942).

The above quotation cited and repeated with approval in *Stroble v. California*, 343 U. S. 181, 198 (1951).

In the *Stroble* case, *supra*, the Court stated:

> "Indeed, at no stage of the proceedings has petitioners offered so much as an affidavit to prove that any juror was in fact prejudiced by the newspapers stories." (p. 195)

In the case at bar the petitioners have not offered an affidavit of a single juror to prove that the testimony to which they object even influenced the verdict. The Delaware Supreme Court pointed out that the three experienced and able trial counsel, who represented the petitioners at the trial, did not comment on the matter in their argument to the jury (p. 130).

Petitioners' contention that the jury might have been influenced by the testimony on time and number of copies signed is pure speculation.

Erroneous testimony does not rob a trial of fundamental fairness. In the instant case petitioners do not con-

tend that the questioned testimony amounts to perjury. It is apparent that it did not.

However, even if the testimony had been perjury it was not known to the prosecution. See *Mooney v. Holohan*, 294 U. S. 103, 55 S. Ct. 340; *Casebeer v. Hudspeth*, 121 F. 2d 914; *Tilghman v. Hunter*, 167 F. 2d 661; *Hinley v. Burford*, 183 F. 2d 581; *Wild v. Oklahoma*, 187 F. 2d 409.

Petitioners' reliance on *Leyra v. Denno*, 347 U. S. 556 (1954) and *United States v. Morgan*, 2d Cir., 222 F. 2d 673 is not well placed for in each of those cases there was an alleged violation of a constitutional right, extorted confession in *Denno* case and failure to provide counsel in the *Morgan* case. Not so in the instant case.

The Delaware Supreme Court stated the nature of this case:

> "It is simply, as above stated, a case of false answers given by a witness upon a collateral or incidental point", p. 131.

The case of *Communist Party v. Subversive Activities Control Board*, 76 Sup. Ct. 663, is not in point here and is not of any assistance to this Court inasmuch as the Court there decided the matter on the basis of this Court's supervisory functions in relations to proceedings in the Federal Court. This Court's view of its supervisory function in cases arising in Federal Courts is also discussed in *McNabb v. United States*, 318 U. S. 332, 318 Sup. Ct. 608, 613. In the *McNabb* case this Court said:

> "Moreover, review by this Court of state action expressing its notion of what will best further its own security in the administration of criminal justice demands appropriate respect for the deliberative judgment of a state in so basic an exercise of its jurisdiction."

CONCLUSION.

Petitioners have not attempted to carry the burden of showing the essential unfairness necessary before this Court will set aside convictions. There is no conflict of decisional law that might be reconciled by this case.

The decision below was clearly correct. We respectfully submit that the petition for certiorari should be denied.

Respectfuly submitted,

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